APPENDIX A

Opinion and Order of the New York State Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

PAUL IRA FERBER,

Appellant.

Herald Price Fahringer, Paul J. Cambria, Jr., and *Barbara Davies Eberl* for appellant.

Robert M. Morgenthau, District Attorney (*Donald J. Siewert* and *Robert M. Pitler* of counsel) for respondent.

Per Curiam.

Based on the sale of two films to an undercover New York City police officer, defendant was indicted on two counts of promoting an obscene sexual performance by a child (Penal Law, § 263.10) and two counts of promoting a sexual performance by a child (Penal Law, § 263.15). Prior to trial he moved to dismiss the charges on the ground,

among others, that the latter statute (Penal Law, § 263.15) was unconstitutional. The motion was denied. A jury subsequently acquitted the defendant of the obscenity charges, but found him guilty of both counts of promoting a sexual performance by a child.

The Appellate Division affirmed the conviction, without opinion. The defendant appeals. The primary question is whether section 263.15 of the Penal Law on its face infringes rights guaranteed by the First Amendment.[1]

At the outset we note that where First Amendment rights are in issue, a party generally has standing to challenge a statute on its face, that is, as applied to other cases (*Broadrick v Oklahoma*, 413 US 601, 611). Although this type of broad attack is more limited when the statute regulates or proscribes conduct as opposed to "pure speech" (*ibid.*, at p 614-615), the statute at issue here is clearly aimed at books, films and other traditional forms of expression (see Penal Law § 263.00, subd 4) as is evident from the defendant's indictment and conviction.

Section 263.15 of the Penal Law is part of a statutory scheme enacted in 1977. The stated purpose is to protect children from exploitation in sexual performances (L. 1977, ch 910, § 1). The use of a child less than 16 years of age in a sexual performance is prohibited by section 263.05 of the Penal Law. Those who promote such performances are also subject to prosecution. Section 263.10 of the Penal Law makes it a class D felony to promote an obscene sexual performance involving a child. Section 263.15 of the Penal

1. A Federal court found the statute unconstitutional in *St. Martin's Press v Carey* (440 F Supp 1196). Although that judgment was set aside on appeal on the ground that there was an insufficient likelihood of prosecution (605 F2d 41), that cannot be said in this case.

Law provides a similar penalty for promoting any sexual performance by a child.[2]

It is evident from the statutory scheme that the statute at issue in this case (Penal Law, § 263.15) is not directed at obscene performances which, as noted, are proscribed by the preceding section (Penal Law, § 263.10). In fact if section 263.15 serves any independent purpose, its goal must be to prohibit nonobscene sexual performances involving children. Thus on its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.

A court should, of course, interpret a statute so as to avoid constitutional infirmities, if at all possible (see, e.g., *Matter of Lorie C.*, 49 NY2d 161, 171). In this case, however, it is not possible to save section 263.15 by limiting its application to those who promote obscene performances.

2. Section 263.15 of the Penal Law states: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." The definitions provided in section 263.00 of the Penal Law indicate that "sexual conduct" includes specified acts real or simulated (subd 3), and that a performance includes any play, motion picture, photograph, dance and "any other visual representation exhibited before an audience" (subd 4).

The fact that such activity is already proscribed by section 263.10 indicates that the Legislature did not intend the statute now before us to be similarly limited in its application. To read the two statutes as covering the exact same activity would, in any event, effectively invalidate section 263.15 by rendering it meaningless.

Nevertheless, the District Attorney urges that "the issue here is not one of censorship. Rather, promotion of these materials is prohibited in order to protect the children from the sexual exploitation necessarily involved in the production of such materials." In other words the purpose of the statute is not to protect the audience from viewing offensive materials, but to protect the performers from being exploited by removing the commercial incentive for such productions. Given that objective it is urged that any question as to whether the material is obscene is not determinative because the Legislature could reasonably conclude that the effect on a child is no less damaging when the finished product happens not to be obscene.

By the same token the effect on freedom of expression is the same whether the government bluntly seeks to censor what it finds offensive, or more benignly acts to protect the health and welfare of the performers. Thus no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression (see, e.g., *People v Remeny*, 40 NY2d 527). However, as the District Attorney notes, First Amendment rights are not absolute and may on occasion be outweighed by superior governmental interests.

The State has a legitimate interest in protecting the welfare of minors within its borders, and, at times, that inter-

est may transcend First Amendment concerns (see, e.g., *Prince v Massachusetts*, 321 US 158). The statute at issue in this case would go further, if as the District Attorney urges it is designed to protect children employed in the making of plays, films and books. With respect to recorded performances or photographs the statute draws no distinction between those made in this State and those made elsewhere. Anyone who promotes such materials would be subject to prosecution even though the act recorded may have occurred in another State or country where such conduct may not be prohibited. It applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites. Indeed in this case defendant's conviction did not rest on any contention that the film was made in this State.[3] To the extent the statute would purport to regulate the sexual performances of children throughout the world there is some question as to whether that goal, however commendable, necessarily comes within the police powers of the State of New York.

Equally troublesome is the means adopted by the State to accomplish its purpose. The State contends, in essence, that it may prohibit the sale, showing, distribution, or other promotion of any film, or other visual materials, whenever the making of the film necessarily involved a violation of some other law designed to protect the performers, at least youthful performers, from a danger to their health and well-being. Assuming, without deciding, that the Legislature generally has the power to do this consistent with the First Amendment, the fact remains that it has not done so uniformly in this State. Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item,

3. Neither was there any contention that the film was made after the statute went into effect.

in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities which the Legislature in the exercise of its police power has determined is [*sic*] dangerous to the health or well-being of child employees or employees generally (see, e.g., Penal Law § 260.10, subd 7; Labor Law, § 130 *et seq.;* Education Law, § 3215 *et seq.;* § 3228 *et seq.;* cf. Penal Law, § 245.05, subds 2, 3). The severe penalties imposed by section 263.15 of the Penal Law are reserved for those who promote plays, films, books and photographs, dealing with adolescent sex in a nonobscene manner. Thus to the extent that section 263.15 is designed to protect child employees from engaging in acts which the Legislature has found to be dangerous to their well-being the statute is "strikingly underinclusive" (*Erznoznik v City of Jacksonville,* 422 US 205, 214). In short, the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained (*Erznoznik v City of Jacksonville, supra,* at p 215).

In conclusion it is important to emphasize that the statute considered in this case (Penal Law, § 263.15) does not deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law, §§ 263.05, 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

JASEN, J. (dissenting). The majority today holds that the State of New York is without power to prohibit the dissemination of films depicting children of tender years engaging in actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals unless the child's "performance" is determined to be legally obscene. The majority has apparently taken the view that the State's interest in preventing the severe emotional and psychological damage to our children which will result from this base and degrading sexual exploitation is outweighed by the First Amendment right of "expression" of those who promote the distribution of such sexually exploitative material. I cannot agree.

In recent years, there has been a growing public awareness of the increased use of young children in pornographic and sexually exploitive material.[1] Outraged by this abuse

1. The subject has received much attention in the media. ("60 Minutes", Vol IX, No. 33, a broadcast on the CBS Television Network entitled "Kiddie Porn", May 15, 1977, as reprinted in Protection of Children Against Sexual Exploitation, Hearings before the Subcomm to Investigate Juvenile Delinquency of the Senate Comm on the Judiciary, 95th Cong, 1st Sess, at p 123; *Chicago Tribune* [a series of articles], May 15, 1977, at p 1, col 1; May 16, 1977, at p 1, col 1; May 17, 1977, at p 1, col 1, reprinted in Sexual Exploitation of Children, Hearings Before the Subcomm on Crime of the House Comm on the Judiciary, 95th Cong, 1st Sess, at pp 428-442; Child's Garden of Perversity, *Time*, April 4, 1977, at p 55; see Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U of Mich J of L Reform 295.) I note also that the characterization of such material as "pornographic" does not necessarily imply that it is "legally obscene". While it is fair to say that most obscene material is pornographic, the converse is not necessarily true, for a given performance's "obscenity" in a legal sense depends upon the standards of the community in which it finds itself.

of our children, the Legislature enacted section 263.15 of the Penal Law, among others, to eliminate this exploitation of our children and to curb this burgeoning industry.[2] The statute states: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." Another statute defines "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals" and defines "performance" as any "play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." (Penal Law, § 263.00, subds 3, 4.) Section 263.15 makes illegal the dissemination, sale or other "promotion" of such sexual "performances" by children whether the performance is obscene or not.

Unlike an obscenity statute, section 263.15 is not concerned with the effect of this sexually exploitive material upon the community. Instead, it is primarily concerned with the effect which the depicted conduct has on the chil-

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2. One researcher, Robin Lloyd, in his book For Love or Money: Boy Prostitution in America, has documented the existence of over 260 so-called "boy" and "girl" magazines, with titles such as "Torrid Tots", "Night Boys", "Lolita", "Boys Who Love Boys", and "Children Love". (Lloyd, For Love or Money: Boy Prostitution in America, at p 226; see Senate Comm on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S Rep No. 95-438, 95th Cong, 1st Sess, at pp 5-6; see, also, Free Speech and Self-Incrimination: The Constitutionality of California's New Child Pornography Laws, 10 Pacific L J 119.)

dren involved.[3] It seeks to inhibit the maintenance of a market which fills the commercial coffers of those who sexually abuse and commercially exploit our children and prohibits conduct—the promotion of sexual performances—which effectively maintains that market.

While it may be conceded that this statute acts to limit the First Amendment rights of promoters of such sexually exploitive material, in my view, this narrow infringement upon the freedom of expression of purveyors of such material is amply justified by the compelling interest of the State in preventing a practice which encourages and, indeed, financially underwrites the sexual abuse and exploitation of our children.

It has long been recognized by the Supreme Court of the United States that the right to freedom of expression embodied in the First Amendment to the Constitution is not absolute. Restraints upon the mode of expression (*United States v O'Brien*, 391 US 367), the time, place and manner of expression (*Adderly v Florida*, 385 US 39; *Cox v Louisiana*, 379 US 559; *Kovacs v Cooper*, 336 US 77) and indeed, even on the substantive content of the expression

3. The Legislature set forth its intent in section 1 of chapter 910 of the Laws of 1977, as follows:

"Section 1. Legislative declaration. The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

"The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act."

itself (see, *e.g.*, *Roth v United States*, 354 US 476; *Chaplinsky v New Hampshire*, 315 US 568; *Schenck v United States*, 249 US 47), have been found to be constitutionally permissible in certain circumstances. The governmental interest which must be shown to justify a particular restraint varies according to the type of restraint imposed.

Time, place or manner restrictions, for example, may be justified upon a showing that such regulations serve a "significant governmental interest and leave ample alternative channels for communication." (*Consolidated Edison v Public Serv. Comm.*, 447 US 530, 535.) Restrictions upon the mode of expression, on the other hand, are subject to a slightly different standard. Where expressive conduct contains both "speech" and "non-speech" elements, the governmental interest in the regulation of the "non-speech" component of the conduct can justify incidental limitations on the actor's freedom of speech. The governmental interest required for this sort of modal limitation is a "substantial governmental interest" which is "unrelated to the suppression of free expression." (*United States v O'Brien*, 391 US 367, 376-377, *supra*.) The strictest standard is applied to content-based restrictions. (*First Nat. Bank of Boston v Bellotti*, 435 US 765, 786.) Where such restrictions are placed upon the speech of private persons, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Consolidated Edison v Public Serv. Comm.*, 447 US 530, 540, *supra*.) Thus, in order to determine whether a particular restraint is permissible, we must first examine the nature of the restraint and then determine whether a sufficient governmental inter-

est justifying the limitation of freedom of expression has been demonstrated.

The restraint upon freedom of expression imposed by section 263.15 of the Penal Law is quite limited. The statute does not restrict in any manner frank discussion of the issue of teenage sexuality or any other issue. It does not purport to limit what may be said or what ideas may be expressed. Instead, it limits only the mode of expression, by requiring that the bodies of our children not be used in expressing one's ideas, and effectuates this requirement by proscribing the sale of films which depict children of tender years engaging in certain sexual acts.[4]

This limitation on the speaker's mode of expression, as noted earlier, is justified if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*United States v O'Brien*, 391 US 367, 377, *supra;* see, also, *Giboney v Empire Stor. Co.*, 336 US 490.) In my opinion, the People have adequately demonstrated that this standard has been met.

There can be no question that the State's interest in the protection of the psychological and emotional welfare of children is substantial and unrelated to the suppression of free expression. The State's overriding interest in the welfare of children has been recognized in many contexts and is often relied upon by the Legislature to protect children

4. It is noteworthy also that the statute does not prohibit the depiction of nudity per se, even when the body of a child is depicted. Instead, it prohibits only depiction of children engaging in certain sexual acts including lewd exhibition of the genitals.

from their own inexperience or as a basis for denying adults rights which they might otherwise have because the exercise of those rights might cause harm to children. For example, the child labor laws restrict the ability of adults to engage children in certain occupations (Labor Law, §§ 130-133) or to employ them at certain times (Labor Law, §§ 170-173; see, also, Education Law, § 3215 *et seq.*; § 3228 *et seq.*). We limit the applicability of contract law in relation to infants (*Casey v Kastel*, 237 NY 305; Restatement, Contracts 2d, § 18 B) and soften the impact of the criminal law upon them (Penal Law, § 30.00; CPL art 720; Family Ct Act, art 7). The law restricts a child's right to marry (Domestic Relations Law, § 15-a). We restrict a child's ability to drive a car (Vehicle and Traffic Law, § 502, subd 2). All this we do to protect our children. The well-being of children is a subject long recognized as within a State's constitutional power to regulate.

Nor is it a novel proposition that the rights protected by the First Amendment should be restricted when the exercise of those rights might endanger the welfare of a child. In *Prince v Massachusetts* (321 US 158), the United States Supreme Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's infringement on First Amendment freedoms. Also, in *Ginsberg v New York* (390 US 629), a proscription against the distribution of nonobscene literature to children was upheld. (See, also, *FCC v Pacifica Foundation*, 438 US 726.) It would seem clear that the State's interest in the prevention of abuse of children in the creation of sexually exploitive literature involving children is at least as compelling as the interest in preventing them from reading it.

It is argued, however, that section 263.15 of the Penal Law cannot achieve that end, for it is not directed at the creators but, rather, at the promoters of such material. I disagree. The creators of such material can only practice their "craft" so long as a market is maintained for their end product. The proscription embodied in section 263.15 is an attempt to prevent the maintenance of such a market. The Legislature has apparently taken the view that no more narrowly drafted statute will achieve an adequate level of protection for our children, and that a proscription of the promotion of such sexually exploitive material involving children is essential.[5] I am persuaded that this conclusion is correct and that the prohibition on promotion of such material causes an incidental restriction on alleged First Amendment freedoms which is no greater than is essential to the furtherance of the State's compelling interest in preventing the use of children in sexually exploitive material.

Moreover, even if I were to agree that section 263.15 is a "content-based" restriction, I would still conclude that the statute is constitutional. The most priceless possessions we have in this Nation are our children. It seems to me that the State's interest in protecting children is so compelling that even a direct restraint would be permissible.

5. The commercial revenue which the promoters of this sexual exploitation of our children derive from their activities is staggering. (Senate Comm on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S Rep No. 95-438, 95th Cong, 1st Sess, at p 6; see, also, Pope, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U of Ill L Forum, 711, 713-716; Comment, Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution, 5 Pepperdine L Rev 809, 812-814.) Given the tremendous profit potential inherent in the production of such material, it is quite reasonable to assume that the production of such material will not abate until the market which underwrites it is eradicated.

In my opinion, there is a "clear and present danger" that the promotion of a "sexual performance" by a child will bring about the substantive evil—child abuse—which the Legislature has a right to prevent. (*Schenck* v *United States*, 249 US 47, 52, *supra*.)

Further, I cannot agree with the majority's conclusion that the statute is unconstitutionally overbroad. It is argued that the wording of the statute is so broad that it brings within its proscriptive scope medical and scientific journals, news documentaries and other socially beneficial literature. In my opinion, however, the statute need not be read so broadly. It is aimed at the commercial sexual exploitation of our youth and can be narrowly construed by this court to reach only such sexually exploitive material. Since the statute is subject to a narrowing construction, it should not be struck down as overbroad on its face. As the United States Supreme Court has stated: "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute

against conduct that is admittedly within its power to proscribe." (*Broadrick v Oklahoma*, 413 US 601, 615.) It seems to me that the potential for infringement upon legitimate speech inherent in the proscription embodied in section 263.15 of the Penal Law is quite small and can adequately be addressed by this court when the need arises. Hence, I would not hold the statute to be unconstitutionally overbroad.

Nor do I agree that the statute is fatally "underinclusive" as the majority suggests. The Legislature need not prohibit the promotion of all products of illegal child labor in order to prohibit any. (*Erznoznik v City of Jacksonville*, 422 US 205, 215.) While it is true that the presumption of statutory validity has less force where a content-based classification is involved, such a classification can be upheld where "there are clear reasons for the distinctions." (*Id.*) The very real danger of severe psychological and emotional injury which will result from the maintenance of a market for sexually exploitive material involving children is such a "clear reason". Moreover, as I have previously noted, in my opinion the statute does not prohibit the expression of any particular idea or message and is not a content-based restriction.

Finally, the majority suggests, without citation of authority, that the potential extraterritorial effect of the statute somehow renders it invalid.[6] To be sure, there is authority for the proposition that one State may not prohibit

6. I note that defendant did not assert that the statute was invalid due to its extraterritorial effect. Thus, he has failed to preserve this issue and we need not reach it on this appeal. I address this unpreserved issue only because the majority has chosen to premise its reversal in part upon this ground.

a citizen of a sister State from disseminating information about activity which is legal in the sister State. (*Bigelow v Virginia*, 421 US 809, 824-825.) However, this is not the effect of section 263.15 of the Penal Law. Much more than the dissemination of information is involved. The conduct prohibited causes a market for sexually exploitive material involving children to be maintained in New York. The maintenance of this market leaves open the financial conduit by which the production of such material is funded and materially increases the risk that New York children will be injured. In short, the production of such material outside New York for sale here causes harm in New York and is, therefore, subject to the police power of the State of New York at least insofar as that power operates upon the promotion of such material here. (Cf. *Strassheim v Daily*, 221 US 280, 285; *Hyde v United States*, 225 US 347, 362-363; see, also, *Skiriotes v Florida*, 313 US 69, 74-76; *Ford v United States*, 273 US 593, 620-624.)

Accordingly, for all of the above reasons, I would affirm the order of the Appellate Division and uphold the constitutionality of section 263.15 of the Penal Law.

Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg and Meyer concur in *Per Curiam* opinion; Judge Jasen dissents and votes to affirm in a separate opinion in which Judge Gabrielli concurs.

Order reversed, etc.

APPENDIX B

Order of the Supreme Court— Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 28, 1980

Present—

Hon. Arnold L. Fein, Justice Presiding
David Ross
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman, Justices

The People of the State of New York,

Respondent,

against

Paul Ira Ferber,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Cropper, J.), rendered on Jan-

uary 31, 1979, convicting defendant of promoting a sexual performance by a child, and said appeal having been argued by Mr. Herald P. Fahringer of counsel for the appellant, and by Mr. Donald J. Siewert of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL § 460.50(5).

Enter:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

APPENDIX C

Opinion and Order of the New York Supreme Court Denying Respondent's Motion to Dismiss the Indictment

SUPREME COURT

TRIAL TERM, NEW YORK COUNTY

October 24, 1978

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

v

PAUL IRA FERBER,

Defendant.

APPEARANCES OF COUNSEL:

Herald Price Fahringer for defendant.
Robert M. Morgenthau, District Attorney (*Benjamin Brafman* and *Philip Kunsberg* of counsel), for plaintiff.

OPINION OF THE COURT

IRVING LANG, J.

In 1977, the Legislature of the State of New York enacted chapter 910 of the Laws of 1977, entitled "AN ACT

to amend the penal law, in relation to sexual performances by children," which added article 263 to the Penal Law of this State.

The defendant, apparently the first person prosecuted under this statute, now challenges the constitutionality of article 263.

THE FACTS

The People allege that on March 5 and March 7, 1978, an undercover agent went to the defendant's bookstore in New York County and purchased two films which the defendant purportedly depicted as "Kiddie Films." Subsequently the defendant was arrested and indicted for violations of section 263.10 of the Penal Law (promoting an obscene sexual performance by a child) and section 263.15 of the Penal Law (promoting a sexual performance by a child).

ARTICLE 263

The two specific provisions of article 263 of the Penal Law provide as follows:

"§ 263.10—Promoting an obscene sexual performance by a child.

"A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age."

"§ 263.15—Promoting a sexual performance by a child.

"A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."*

The operative terms employed in both sections are further defined in section 263.00 of the Penal Law as follows:

"As used in this article the following definitions shall apply:

"1. 'Sexual Performance' means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

"2. 'Obscene sexual performance' means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

"3. 'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual beastiality [*sic*], masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.

"4. 'Performance' means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

"5. 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

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* These new offenses are punishable as class D felonies, which carry a maximum imprisonment for up to seven years as to individuals, and as to corporations a fine of up to $10,000 (Penal Law, §§ 70.00, 80.10).

"6. 'Simulated' means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breast, genitals or buttocks.

"7. 'Deviate sexual intercourse' means the conduct defined by subdivision two of section 130.00 of this chapter.

"8. 'Sado-masochistic abuse' means the conduct defined in subdivision five of section 235.20 of this chapter."

THE CHALLENGE

Implying that the very fabric of the First, Fifth and Fourteenth Amendments of the United States Constitution (and the corresponding provisions of the New York State Constitution) would be shredded by upholding article 263 of the Penal Law, the defendant asserts that the statute is overly broad, vague, irrational, arbitrary, serves no legitimate State interest, is penally excessive and violates the doctrine of equal protection of the laws.

THE LAW

Before discussing the specific provisions of sections 263.10 and 263.15 of the Penal Law certain postulates should be noted.

First. Obscene material has no constitutional sanction or protection (*Roth v United States,* 354 US 476; *Miller v California,* 413 US 15).

Second. The statutory definition of obscenity in section 235.00 of the Penal Law, incorporated by reference in article 263 of the Penal Law, tracks the guidelines of the

United States Supreme Court in *Miller v California* (413 US 15, 24, *supra*). They are "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct as specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Third. The well-being of children is a subject long recognized as within a State's constitutional power to regulate, particularly in relation to sexual matters. (*Ginsberg v New York,* 390 US 629; *Prince v Massachusetts,* 321 US 158; *Miller v California,* 413 US 15, *supra; Paris Adult Theatre I v Slaton,* 413 US 49.) In *Prince* (*supra*), the Supreme Court held that the State has legitimate interests in both protecting the welfare of its children and in seeing that they are safeguarded from abuses which might prevent their growth into free and well-developed citizens.

This proper concern for the welfare of children might well restrict what otherwise would be constitutionally protected conduct.

Even in those cases where ordinances have been struck down as facially invalid, the right of a Legislature to enact laws to protect children vis-à-vis sexual material has been sustained. Reversals have resulted primarily because statutes were drafted too broadly. (Cf. *Calderon v City of Buffalo,* 61 AD2d 323; *Erznoznik v City of Jacksonville,* 422 US 205.) It is merely an example of the court telling the Legislature: "Do it, till you do it right."

VAGUENESS

Within the context of the above discussion we will now examine the contentions of the defendant. Both sections 263.10 and 263.15 are alleged to "suffer from the constitutional vice of vagueness." It is claimed that legislation limiting freedom of expression which fails to give fair notice of what acts will be punished violates the Constitution (*Winters v New York*, 333 US 507; *People v Kahan*, 15 NY2d 311).

While the principle is correct, the application is erroneous. The defendant asserts that the definition of sexual conduct fails to provide necessary notice to those who may be subject to its provision as to what is prohibited or permitted. The statute is manifestly sufficiently definite to give a person of ordinary intelligence fair notice of what conduct is forbidden (*People v Smith*, 44 NY2d 613).

Indeed, most of the prohibited forms of sexual conduct are described with anatomical precision. Further, there is a requirement of "*scienter*" limiting liability to those who know the character and content of what is being promoted (*Ginsberg v New York*, 390 US 629, 644, *supra*). The statute clearly provides "reasonably ascertainable standards of guilt" (*Mishkin v New York*, 383 US 502, 507); and the defendant, knowing the content of what he is distributing, will recognize when his conduct approaches the brink of illegality. (*Roth v United States*, 354 US 476 *supra*.)

AFFIRMATIVE DEFENSES

The defendant also challenges the affirmative defenses to the statutes by nature of their alleged discriminatory and arbitrary classifications, which it is claimed violate the equal protection clause of the Fourteenth Amendment.

Subdivision 2 of section 263.20 of the Penal Law evidences the Legislature's intent to carve out a special defense to projectionists, librarians, ushers, etc., but fails to provide the same defense to similarly situated nonmanagerial employees in other types of establishments, such as, in the instant case, a bookstore. Suffice it to say that the defendant, allegedly the principal owner of the bookstore, lacks the requisite standing to attack this provision, as he is not of the class affected by its application. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others". (*Broadrick v Oklahoma*, 413 US 601, 610.) As the court in *United States v Raines* (362 US 17, 22) stated: "The delicate power of pronouncing an Act * * * unconstitutional is not to be exercised with reference to hypothetical cases".

SECTION 263.10

The defendant specifically challenges the validity of section 263.10 of the Penal Law, promoting an obscene sexual performance by a child, as overbroad, vague and irrational and additionally carries an unconstitutionally excessive penalty. The thrust of the defendant's argument is that the statute escalates punishment of obscene material, ordinarily a misdemeanor (maximum one year) to a class D felony (maximum seven years) by the mere inclusion of a particular segment, sexual conduct by a child, which in and of itself may not be legally obscene. Thus, argues counsel in his brief, "a tasteful depiction of sexual conduct by a juvenile would, if it satisfied the standard of Miller, supra, militate against a finding that the work is obscene, and, if

the jury would find that in spite of the presence of such protected expression the performance or vehicle is nevertheless obscene, this very same depiction would serve to increase the defendant's penalty drastically".

One might wonder how to create a nonobscene "tasteful depiction" of sexual conduct by a juvenile within an overall obscene performance. It is difficult to conceive of a "tasteful depiction" of sodomy or masturbation or beastiality [*sic*].

But even if such a nonobscene, tastefully depicted sexual conduct by a child was possible (a highly doubtful proposition), the defendant's contention must fail.

The primary purpose of the statute is the protection of children. The purpose is "To eliminate the sexual exploitation of children by establishing strict criminal sanctions against individuals who induce children to participate in sexual performances and who profit from the distribution of such material" (Memorandum in Support A-3587-C, Assemblyman Lasher).

This is a valid legislative purpose, reasonable and rational, as is the escalation of penalty for those who abuse or profit from such exploitation. The increased penalty neither shocks the conscience nor offends this court's sense of fundamental fairness.

SECTION 263.15

The major attack on the statute is addressed to section 263.15 of the Penal Law, promoting a sexual performance by a child. This section poses greater constitutional problems, for the section prohibits sexual conduct by a child, even if the performance is within a constitutionally protected context. This clearly was the intent of the Legislature.

"Although one promotion section of the new Article is based on an obscenity standard, the primary intent of the Article is to make the inducement of children to engage in sexual performances and the promotion of such material absolutely prohibited. It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political, or social value. In essence this Article would make material containing children in sexual performances, *no matter what the purpose,* against the public policy of this state" (Memorandum in Support A-3587-C, Assemblyman Lasher; emphasis in original).

Hence our Legislature has said that even within a work of obvious literary or artistic merit, sexual conduct by a child, as defined in article 263 of the Penal Law, is prohibited.

This poses the not unusual dilemma of balancing the right of freedom of expression against the right of the Legislature to protect children against sexual exploitation. The "variable obscenity" test (what may be constitutionally protected for adults is not necessarily protected for children) is inapposite since "variable obscenity" refers to distribution of sexual material to minors. Here, we are dealing with use of minors in performances of sexual conduct (*Ginsberg v New York,* 390 US 629, *supra*).

On balance, the protection of children must prevail. Further, the likelihood that children performing sexual intercourse or lewdly exhibiting their genitals would constitute an important part of a performance is highly remote in any event. If it were important for literary or artistic value, a juvenile over 16 who perhaps looked younger could be utilized. Simulation outside of the pro-

hibition of the statute could provide another alternative. Where alternate means to safeguard expression are reasonably available, courts should not declare statutes unconstitutional which may inhibit such expression but which have independent and overriding justification.

In the words of the United States Supreme Court in *Broadrick v Oklahoma* (413 US 601, 615-616, *supra*) this case finds the statute "not substantially overbroad and that whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

Indeed, it would seem anomalous for the State to be able to prohibit the employment of a child under 16 from working as a stagehand but be prevented from prohibiting the use of that child to engage in sexual intercourse on stage.

While the defendant's attack on the statute invokes the spectre of Peter Zenger, Henry Miller, James Joyce, and D. H. Lawrence being imprisoned for violating its provisions, in reality we are dealing with two 8 mm. films, apparently 10 minutes in duration, one depicting a boy masturbating, the other a group of boys engaging in sexual conduct.

In sum, I find no constitutional impediment to this legislation. Its impact on limiting legitimate free expression is remote, hypothetical and speculative. It is aimed at curbing the pernicious practice of profiteering in the sexual exploitation of children, a proper purpose, properly enacted.

The motion to dismiss the indictment on constitutional and all other grounds is denied.